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Supreme Court, U.S.
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No. 02-1511

IN THE

Supreme Court of the United States

EUGENE BOOKER,
Petitioner,

v.

CITY OF ST. LOUIS, A MUNICIPAL CORPORATION;
NINA MURPHY, CHAIRPERSON OF THE CIVIL SERVICE COMMISSION OF THE CITY OF ST. LOUIS, IN HER INDIVIDUAL AND OFFICIAL CAPACITIES;
JOHN H. CLARK, VICE-CHAIRPERSON OF THE CIVIL SERVICE COMMISSION OF THE CITY OF ST. LOUIS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES;
KAY V. LEONARD, MEMBER OF THE CIVIL SERVICE COMMISSION OF THE CITY OF ST. LOUIS, IN HER INDIVIDUAL AND OFFICIAL CAPACITIES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PATRICIA HAGGMAN
CITY COUNSELOR
JUDITH A. RONZIO
Counsel of Record
NANCY R. KISTLER
ASSOCIATE CITY COUNSELORS
LAW DEPARTMENT
ROOM 314, CITY HALL
1200 MARKET STREET
ST. LOUIS, MO 63101
314-622-3361
Attorneys for Respondents
CITY OF ST. LOUIS, ET AL.

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

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REASONS FOR DENYING THE WRIT

I. Respondent Objects to Consideration of the Sole Question Presented Herein, Inasmuch As the Issue Was Not Timely Raised in the Proceedings Below.

The sole question presented by the Petition is whether the Fourth Amendment prohibits "opposite sex direct monitoring and observation of public employees while providing urine samples for drug testing" (Petitioner's Brief, page i). Petitioner argues that both the District Court and the United States Court of Appeals for the Eighth Circuit have improperly held that such opposite sex monitoring is constitutional.

Respondents City of St. Louis, Nina Murphy, John H. Clark and Kay V. Leonard, members of the City's Civil Service Commission, object to the consideration of this question by this Court in that it was not timely raised in the proceedings below. (Hereinafter, the term "Respondent" or "Respondent City of St. Louis" shall for convenience be used to signify all Respondents).

Petitioner was dismissed from his employment as a correctional officer with Respondent City of St. Louis when, after random drug testing, it was found that Petitioner's urine tested positive for illegal drugs. Petitioner then appealed his dismissal to the Civil Service Commission of the City of St. Louis, where he was represented by counsel and testified on his own behalf. At that administrative hearing, Petitioner did not raise as an issue the constitutionality of opposite-sex monitoring and, accordingly, Respondent offered no testimony as to the circumstances which gave rise to the opposite-sex monitoring.

Petitioner then filed an action in the United States

District Court for the Eastern District of Missouri pursuant to 42 U.S.C. 1983. Again, the constitutionality of opposite-sex monitoring was not raised as an issue, as evidenced by the lack of any reference thereto in Plaintiff's Complaint. (J.A. at 7-20).

In fact, the first time Plaintiff indicates any concern whatsoever about opposite-sex monitoring is in the Affidavit of Eugene Booker (J.A. 86-88), included within Plaintiff's Proof in Opposition to Defendants' Motion for Summary Judgment. Although Respondent maintained that the issue of the constitutionality of opposite-sex monitoring had not been timely raised and, therefore, should not be considered by the District Court, the Court nevertheless proceeded to consider the issue and to rule in Respondent's favor with respect thereto.

Similarly, when Petitioner appealed the decision of the District Court to the United States Court of Appeals for the Eighth Circuit, Respondent again argued that the issue of the constitutionality of opposite-sex monitoring had not been timely raised and should not be considered. The Eighth Circuit also, however, decided to consider the issue and, like the District Court, ruled in Respondent's favor on that question, as well as all others.

A party may not create an issue of fact by filing an affidavit, after a motion for summary judgment has been made, which contradicts prior discovery and deposition responses. *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986); *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2nd Cir. 1969).

For this reason, as well as the reasons set forth herein, Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

II. The Question Presented Is of Little Significance In That: 1) It Is an Isolated Occurrence as Evidenced by the Fact That Respondent's Policy Now Expressly Calls for Same-Sex Monitoring on Those Occasions When Observation Is Necessary during Drug Testing, and 2) the Paucity of Case Law on This Issue Among the Circuits Indicates That It Is an Issue Which Rarely Arises and 3) It Is Fact-Specific in That Petitioner Was an Employee in a Correctional Institution and, Therefore, Had a Diminished Expectation of Privacy and In That Petitioner Had His Back Turned to the Monitor.

1) Isolated Occurrence. If the Court were to grant certiorari in this matter, it would be doing no more than reviewing the facts with respect to an individual Petitioner's drug testing procedure. The case is so fact-specific that it is unlikely to be duplicated elsewhere and, more importantly, will have no general impact, nor even a localized impact upon Respondent City of St. Louis.

It is highly unlikely that a determination by the Court in this case would have any general impact. As Petitioner points out, this appears to be the first instance in which a federal court of appeals has ruled on the permissibility of opposite-sex monitoring in the context of drug testing public employees. There is no conflict among the federal circuit courts with respect to this issue. In fact, there is no case law precisely on point.

Presumably, this is because the issue rarely arises. This is not surprising since it is difficult to imagine an employer insensitive or foolhardy enough to establish a

policy or custom requiring, or even a practice of regularly permitting, opposite-sex monitoring for drug testing by urinalysis. This is not an issue which presently commands the attention of courts, employers and employees to any significant degree.

Additionally, a decision by this Court would have no impact on Respondent City of St. Louis because, first, Respondent did not conduct its own drug testing but, rather, contracted with an outside firm, BJC Health Services ("BJC") to handle all matters pertaining to drug testing. BJC, in turn, engaged a subcontractor ("subcontractor") to do the actual collection of urine specimens of Respondent's employees. (Petitioner's Brief, page 2a). Thus, it was not Respondent, itself, who permitted opposite-sex observation in this case, but BJC's subcontractor.

The record is devoid of explanation as to how or why, or even if, the subcontractor engaged in opposite-sex observation in this case. This is because Petitioner neglected to raise the issue of opposite-sex observation at his hearing before the Civil Service Commission and, in fact, did not see fit to raise the issue until he filed his Suggestions in Opposition to Summary Judgment in the District Court.

Further, although the matter of the monitor's gender was not addressed in Respondent's written drug testing policy as it existed at the time of Petitioner's drug testing, Respondent's current policy expressly calls for same-sex monitoring in those cases where monitoring may be warranted.[1] It is clear, therefore, both that

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[1] Department of Personnel Administrative Regulation 120, effective October 1, 2001, states: "When a directly observed collection is required, the observer will be an employee of the collection service, who is of the same gender as the employee."

Respondent's policy requires no revisions and that a decision by this Court would have no impact on Respondent's policies or procedures in this regard.

2) No Need for Decision. There is no conflict among the federal circuit courts with respect to the issue of same-sex monitoring during collections of urine specimens from public employees. In fact, there are virtually no other reported cases on this issue. Thus, it appears that this is not a question of serious concern for employers or employees throughout the country, nor one that the United States Supreme Court needs to resolve. Respondent would suggest, in fact, that most employers who engage in urinalysis testing of employees already use same-sex monitoring when observation is warranted and there is no body of law to indicate that district or appellate courts would rule in a manner that would need this Court's clarification or guidance.

The general understanding among employers that same-sex monitoring is preferable to opposite-sex observation is undoubtedly the reason why, as Petitioner points out, this is the first case in which a federal court has made a determination with respect to opposite-sex urinalysis observation. The issue simply does not arise with any frequency.

Even in the City of St. Louis, this instance of opposite-sex observation appears to be an isolated occurrence, inasmuch as Petitioner has never accused Respondent of engaging in a pattern or practice of opposite-sex monitoring.

It is well-settled that an isolated occurrence is not sufficient to state a cause of action against a municipality pursuant to 42 U.S.C. 1983. *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct.2427, 85 L.Ed. 2d 791 (1985). Thus, even if certiorari were granted in this

matter, the Court's consideration would not likely go beyond the threshold issue of "isolated occurrence" and would not, therefore, have any impact whatsoever.

Again, Respondent would ask the Court to note that it was not Respondent, itself, that engaged in, or authorized, the opposite-sex observation. Rather, it was the subcontractor of BJC, the company with whom Respondent contracted, that was responsible for supplying the monitor in this instance. Inasmuch as neither BJC, nor its subcontractor, was named as a party-defendant in the court below, and inasmuch as Respondent's current policy already requires same-sex monitoring, a decision by this Court would effect only minimal change, if any.

3) Fact-Specific / Diminished Expectation of Privacy. The facts of this specific case are that Petitioner was employed by Respondent at one of its correctional facilities at the time he was randomly selected for drug testing. The urine specimen collection took place on the premises of the correctional facility in what amounted to a locker room with toilet stalls. Other persons were entering and exiting the locker room during the collection process.

As the courts below have noted – and contrary to Petitioner's contention – both employees and inmates of correctional facilities have diminished expectations of privacy. *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 567 (8th Cir. 1988); *Timm v. Gunter*, 917 F.2d 1093, 1102 (8th Cir. 1990), *cert. denied* 501 U.S. 1209, 115 L.Ed.2d 979, 111 S.Ct. 2807 (1991); *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988).

Because of this fact-specific situation, any decision this Court might render would be of only limited applicability and utility.

III. Petitioner's Allegation That the Eighth Circuit's Decision Conflicts with the Supreme Court's Analysis and Standards Established in *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) Is Inaccurate.

1) *Vernonia* Was Immaterial to the Decision of the Eighth Circuit.

In the first instance, it is clear that the Eighth Circuit did not find it necessary to rely on *Vernonia School District 47 J v. Acton*, 515 U.S. 646 (1995), in order to reach its decision in this matter. The Appellate Court's actual holding is set out on page 6a of Petitioner's Brief, in the copy of the Eighth Circuit's decision appended to said Brief. What the Eighth Circuit specifically held was:

> On appeal, Booker argues that Curia violated the City's regulation concerning privacy in drug testing. Even if she did, a violation of a municipal regulation does not establish a constitutional violation for purposes of §1983. See *Ebmeier v. Stump*, 70 F.3d 1012, 1013 (8th Cir. 1995). In addition, the City could not be held vicariously liable for a violation of its regulation. See *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999).

The Eight Circuit's reference to *Vernonia,* immediately follows the above quote at page 7a of Petitioner's Brief and is clearly an alternative theory, set out in addition to its primary holding:

> In any event, even assuming, as Booker alleges, that Curia stood a foot behind him as he provided the sample in a bathroom stall located in the restroom of a locker room in the correctional facility, we do not believe the manner of collection was

> so intrusive as to constitute an unreasonable search. In *Vernonia Sch. Dist.*, 515 U.S. at 657, the Supreme Court....

Thus, this Court need not consider whether the Eighth Circuit correctly applied the *Vernonia* analysis, inasmuch as *Vernonia* was not necessary to the determination of the court below since the Appellate Court had already determined that a violation of a municipal regulation did not amount to a constitutional violation, and that , moreover, there could be no vicarious liability.

2. The Eighth Circuit's Decision Does Not Conflict with This Court's Analysis and the Standards Set Out in *Vernonia*.

By Petitioner's own analysis, Petitioner's Brief, page 3, *Vernonia* considered three factors in judging the constitutionality of governmental drug testing:

> ...(1) the nature of the privacy interest upon which the search intrudes; *Id.* at 654 (2) the character of the intrusion that is complained of; *Id.* at 658 and (3) "the nature and immediacy of the government's concern at issue and the efficacy of the means employed for meeting" that concern. *Id.* at 660.

The Eighth Circuit dutifully applied this three-factor analysis to the instant case.

With respect to the nature of the privacy interest upon which the search intrudes, the Eighth Circuit recognized this Court's acknowledgment of the privacy interest in the excretory function of giving urine. It also noted, however, that certain categories of individuals have a diminished expectation of privacy, referencing a line of cases holding that opposite sex observation of inmates by prison guards is acceptable in certain cir

cumstances. *Timm v. Gunter*, 917 F.2d 1093, 1102 (8th Cir. 1990) *cert. denied*, 501 U.S. 1209, 115 L.Ed. 2d 979, 111 S.Ct. 2807 (1991); *Michenfelder v. Sumner*, 860 F.2d 328, 334 (9th Cir. 1988).

In fact, the Eighth Circuit decision, Petitioner's Brief, page 6a, states that Petitioner also concedes that "...as a correctional officer in a medium security institution, he had a diminished expectation of privacy." This is in harmony with the holding in *Vernonia that:*

> Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy. See *Skinner,* 489 U.S. at 627; *United States v. Biswell,* 406 U.S. 311, 316, 32 L.Ed.2d 87, 92 S.Ct. 1593 (1972).

Nor is the Eighth Circuit's analysis of the character of the intrusion complained of at odds with this Court's holding in *Vernonia.* Both decisions recognize that the giving of urine is a function ordinarily shielded by privacy. Again, both decisions hold that the degree of intrusion is determined by the manner in which the giving of the urine sample is monitored.

At various points in his argument, Petitioner infers that he should not have been monitored at all. Respondent suggests that this should not be a issue for consideration here, since the only question presented for review is whether the Fourth Amendment prohibits opposite-sex monitoring of public employees while providing urine samples for drug testing. Therefore, Petitioner has effectively conceded the propriety of monitoring for purposes of this Petition for Certiorari.

With regard to the issue of opposite-sex monitoring of

urine production for drug testing, Petitioner cites no law expressly prohibiting same. Respondent City agrees that same-sex monitoring is preferable – and, indeed, Respondent's policy calls for same-sex monitoring. Respondent, however, would suggest that there may be circumstances under which same-sex monitoring is not possible or practicable. Unfortunately, there is no testimony on this issue included in the record of Petitioner's appeal to the City's Civil Service Commission because Petitioner did not raise the issue of the constitutionality of opposite-sex monitoring until he filed his Brief in Opposition to Summary Judgment in the District Court.

In the absence of any express prohibition on opposite-sex monitoring, the sex of the monitor becomes merely another factor in ascertaining the degree of the intrusion on Petitioner's privacy.

In this case, the Eighth Circuit accepted Petitioner's claim that he was required to urinate in a bathroom stall, and that a monitor of the opposite sex stood a foot behind him (Petitioner's Brief, page 6) "so that she could observe his genitals as he provided his urine sample." (Petitioner's Brief, page 7). Respondent notes that, even in Petitioner's version of the situation, the only allegation is that the monitor "could" have observed his genitals – not that she did, in fact, observe them. In fact, it is clear that Petitioner's back was turned, thus providing a shield.

In any event, the Eighth Circuit apparently determined that the factual scenario presented by Petitioner represented only a negligible intrusion on Petitioner's privacy, citing both *Vernonia, Id.* at 657 and *Wilcher v. City of Wilmington,* 139 F.3d 366 (3d Cir. 1998) as support. In both cases, as in the instant case, urine production for drug testing was monitored, with the

monitors standing behind the fully-clothed individuals providing the samples.

Finally, with regard to the nature and immediacy of the government's concern and the efficacy of the means employed to meet that concern, Petitioner has already conceded the gravity of Respondent's concern. As set out in the Eighth Circuit's decision (Petitioner's Brief, page 6a):

Booker also concedes that the City has a compelling interest "in assuring that the activities of employees who come into daily contact with inmates are not [hindered] by drugs and are fully capable of performing their duties"....

Thus, there is no need for a determination by this Court with respect to a compelling governmental interest.

With regard to the "efficacy" of the means used to achieve the City's goals, there may or may not be less intrusive methods of meeting the City's concerns. Nevertheless, this Court held in *Vernonia*, *Id.* at 663, that "[W]e have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment."

Respondent would submit, therefore, that the decision of the Eighth Circuit does not run *contra* to this Court's holding in *Vernonia*.

CONCLUSION

For all the foregoing reasons, and particularly because of the extremely limited impact any decision by this Court would have, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

PATRICIA A. HAGEMAN,
CITY COUNSELOR

Judith A. Ronzio

Counsel of Record

Nancy R. Kistler

Associate City Counselors

Law Department

Room 314, City Hall

1200 Market Street

St. Louis, MO 63103

314-622-3361

Attorneys for Respondents

City of St. Louis, et al.